No. 869

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL 1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CITATIONS

Cases:

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RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL 1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on December 28, 1959, denying enforcement of an order issued against respondent Union.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 11-17) is reported at 272 F.2d 713. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 15-17)[1] in the unfair labor

[1] "R." designates the portion of the record printed as an appendix to the Board's brief in the court below.

practice proceeding are reported at 121 NLRB 1207. The Board's earlier Decision and Determination of Dispute (R. 19-26) is reported at 119 NLRB 594.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1959 (Appendix B, *infra*, pp. 18-19). On February 18, 1960, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Harlan to and including April 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Section 8(b)(4)(D) of the National Labor Relations Act makes it an unfair labor practice for a labor organization to strike for the purpose of requiring an employer to assign particular work to employees in a particular union or trade rather than to those in another union or trade, unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Section 10(k) of the Act provides that, whenever charges are made of violation of Section 8(b)(4)(D), the Board must first "hear and determine the dispute out of which such [alleged] unfair labor practice [arose]."

The question presented is whether, when a charge is made that a strike to require an employer to make

a particular work assignment violates Section 8(b)(4)(D), Section 10(k) requires the Board to determine affirmatively which of the competing employees is entitled to the work or whether the Board satisfies its statutory duty to "determine the dispute" by deciding that the striking union is not entitled to the work.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 8.(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> > (4) * * * to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal * * * to perform any service, where an object thereof is: * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *
>
> * * * *
>
> Sec. 10. (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have

arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

STATEMENT

A. The Board's findings of fact

In 1952, the Board certified respondent as the bargaining representative of all technicians in certain departments of Columbia Broadcasting System ("CBS") (R. 20; 75). The certification, while enumerating several categories of work, made no mention of the remote lighting work here in dispute (*ibid.*). On May 1, 1956, respondent and CBS executed a collective bargaining agreement which likewise did not cover the work tasks here in dispute (R. 21; 71-84). Indeed, CBS, in the pre-contract negotiations rejected a demand by respondent for inclusion of that work, just as it rejected a similar demand by IATSE [2] (R. 21; 35-40, 84). Accordingly, the question of remote lighting assignments remained unresolved (R. 21).

The immediate dispute herein centered upon a telecast by CBS of the Antoinette Perry Awards, scheduled for April 21, 1957, from the Waldorf Astoria

[2] Local 1 of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO.

Hotel (R. 5; 29-31). On or about April 9, 1957, CBS notified respondent that it would assign the remote lighting work for this telecast to its stagehands, who were members of IATSE (R. 5; 29).

On April 18, respondent's business manager Calame threatened Fitts, vice-president of CBS in charge of labor relations, with "trouble" if CBS insisted on assigning the work to IATSE. IBEW International Representative Lighty and respondent's Business Representative Pantell also insisted to Fitts that respondent was entitled to the work and threatened that there would be "trouble" if respondent did not get it (R. 5; 31, 32, 33, 34, 52-55).

On the afternoon of April 21, after stagehands installed all necessary lights for that evening's program, the technicians represented by respondent installed duplicate lights (R. 5-6; 43-44, 68-69). Pantell explained that it was "an IBEW job. If we don't use our lights we are not doing the show" (R. 6; 44-45, 69). CBS Representative Levin advised Pantell that IATSE would operate the lights, and ordered that the duplicate lights be removed, but Bell, as spokesman for the technicians, refused to remove them (R. 6; 45-46, 56-57, 66, 70). Pantell, following a meeting of the technicians, called by him, advised CBS once more that respondent's members would not operate the cameras and necessary incidental equipment if IATSE's lights were used (R. 6; 46, 71). The technicians refused to finish installing the necessary equipment, and did not report for the rehearsal scheduled between 6 and 7 p.m. (R. 6; 48, 71). Finally, at about 10:30 p.m., Levin once more

asked the technicians to make pictures, and they again refused (R. 6; 74-75). As a result the scheduled program was cancelled (R. 6; 50).

B. Proceedings before the Board

1. *The Section 10(k) proceeding*

The unfair labor practice charges filed in April, 1957, alleged that respondent had violated Section 8(b)(4)(D), the "jurisdictional disputes" section of the statute (R. 19). Pursuant to the statutory scheme for the handling of jurisdictional disputes, the Board in June 1957 held the hearing prescribed by Section 10(k) to "hear and determine the dispute" out of which the charge of a Section 8(b)(4)(D) violation arose (*ibid.*).

The Board found, on the basis of the facts set forth above, that CBS's assignment of the remote lighting work to its stagehands, who were members of IATSE, was not in contravention of an order or certification of the Board, and that respondent had no contract with CBS that bound CBS to assign the disputed work to its members (R. 24-25). Under these circumstances, the Board found that respondent was not lawfully entitled to force or require CBS to assign remote lighting work to its members rather than to other CBS employees (R. 25).

Accordingly, the Board directed respondent to notify the Regional Director within ten days whether it would comply with the Board's determination (R. 26).

2. *The unfair labor practice proceeding*

Respondent having refused to comply with the Board's direction (R. 7, 11; 86-87, 88-90), the Gen-

eral Counsel of the Board, on December 27, 1957, issued a complaint alleging a violation of Section 8(b)(4)(D) of the Act. Included in the evidence adduced at the ensuing unfair labor practice hearing were the official records of the prior Section 10(k) proceeding.

Upon the evidence thus adduced, the Board concluded that respondent violated Section 8(b)(4)(D) by "inducing or encouraging the employees of Columbia Broadcasting System, Inc., to engage in a strike or a concerted refusal * * * to perform service with an object of forcing or requiring CBS to assign the work of setting up and operating lighting equipment on remote telecasts to its members rather than to other CBS employees, members of Local 1 [IATSE]" (R. 11-12).

C. The Board's order

The Board's order requires respondent to cease and desist from engaging in, or inducing or encouraging the employees of Columbia Broadcasting System, Inc., to engage in, a strike, or other proscribed conduct, where an object thereof is to force or require Columbia Broadcasting System to assign particular work to members of the respondent union rather than to other employees, except insofar as such action is permitted under Section 8(b)(4)(D). Affirmatively, the order directs respondent to post appropriate notices of compliance with the order (R. 16-19).

D. The decision of the Court of Appeals

The court below denied enforcement of the Board's order on the ground that Section 10(k) requires the

Board affirmatively to allocate the work to one of the competing unions or groups as a prerequisite to the issuance of a cease-and-desist order under Section 8(b)(4)(D), and that it is not enough for the Board merely to determine that the striking union is not entitled to the work by virtue of a contract or Board order or certification. Section 10(k), the court held, contemplates "affirmative Board adjudication of disputed work allotments" and the Board's "function is to impose a settlement in the event that the parties are unable themselves to reach agreement" (*infra*, pp. 13-14).

REASONS FOR GRANTING THE WRIT

The ruling below that the Board is required by Section 10(k) of the Act affirmatively to allocate the disputed work between the competing employees as a prerequisite to the issuance of a cease-and-desist order under Section 8(b)(4)(D) is in conflict with the decision of the Fifth Circuit in *National Labor Relations Board* v. *Local 450, International Union of Operating Engineers, AFL-CIO*, decided February 18, 1960, 45 LRRM 2765 (a copy of the opinion is set forth in Appendix C, *infra*, pp. 20-31). There the court held (*infra*, p. 30), that "where, as here, an employer has assigned work to an employee and a labor organization does any of the acts proscribed by Section 8(b)(4)(D), the Board is not required, as a part of its determination of the dispute, to make an adjudication as between the employer and the labor organization assigning the work to one or the other as a prerequisite to the granting of 10(c) re-

lief * * *." In so holding, the court specifically recognized (*infra*, pp. 26-27) that its decision was contrary to the instant case, and also was contrary to the decisions of the Third and Seventh Circuits (which the court below followed) in *National Labor Relations Board* v. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Locals 420 and 428*, 242 F. 2d 722 (C.A. 3), and *National Labor Relations Board* v. *United Brotherhood of Carpenters and Joiners of America*, 261 F. 2d 166 (C.A. 7).

This Court should resolve the conflict, since it involves "an important question concerning the Board's statutory duty in dealing with jurisdictional disputes" (*Plumbing and Pipefitting* case, *supra*, p. 724). Since the enactment of Section 10(k) as part of the Labor-Management Relations Act of 1947, the Board consistently has held that, absent a Board order or certification, or a contract determining the bargaining representative for employees performing the work involved in the dispute, the employer's work assignment will be accepted. Accordingly, the Board ordinarily has refused in Section 10(k) proceedings to disturb the employer's assignment of the work and to make an arbitration-type award of the disputed work on the basis of such factors as custom, tradition, pattern of employment, etc. In its view, a strike to override the employer's assignment of the work, save in the exceptions noted, violates Section 8(b)(4)(D).[3]

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[3] *Moore Drydock*, 81 NLRB 1108 (1949); *Juneau Spruce*, 82 NLRB 650 (1949); *Los Angeles Building and Construc-*

In the twelve years since the enactment of the amended Act, the Board has conducted more than 100 Section 10(k) hearings on this basis, and almost 1200 charges alleging violation of Section 8(b)(4)(D) have been filed with the Board. The decision below overturns this settled administrative practice, and would require the Board to make the kind of work award in a Section 10(k) proceeding which, it believes, Congress did not intend it to make and which, in accordance with that view, it has heretofore consistently refrained from making.

CONCLUSION

In view of the express conflict of decisions on an issue of substantial importance in the administration of the National Labor Relations Act, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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General Counsel,

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Associate General Counsel,

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APRIL 1960.

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tion Trades Council, etc. [*Westinghouse*], 83 NLRB 477 (1949); *Newark & Essex Plastering Co.*, 121 NLRB 1094 (1958); National Labor Relations Board *Fourteenth Annual Report* (1949), pp. 99-104; *Twentieth Annual Report* (1955), pp. 115-120; *Twenty-second Annual Report* (1957), pp. 108-113.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24—October Term, 1959

(Argued October 16, 1959, Decided December 3, 1959)
Docket No. 25573

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL 1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, RESPONDENT

Before CLARK, *Chief Judge*, MOORE, *Circuit Judge*, and J. JOSEPH SMITH, *District Judge*.

The National Labor Relations Board petitions for enforcement of a cease and desist order it has entered against the respondent union on a finding of unfair labor practices. 121 N. L. R. B. No. 158. An earlier decision concerning this matter is reported at 119 N. L. R. B. 954. Enforcement denied.

CLARK, *Chief Judge*:

The National Labor Relations Board petitions for enforcement of its order that the respondent union (IBEW) cease and desist from conduct found to constitute an unfair labor practice under §8(b)(4)(D),

29 U. S. C. §158(b)(4)(D), the "jurisdictional dispute" provision of the Labor-Management Relations Act of 1947. Briefly stated, the underlying dispute is between the respondent union and an IATSE local [1] over assignment by the Columbia Broadcasting System of lighting work in connection with certain "remote" television broadcasts, i.e., those not originating in the company's home studios. This continuing dispute has necessitated the cancellation of several telecasts following work stoppages by one of the unions when lighting work was assigned to the other. The present proceeding arises from such an incident instigated by respondent's refusal to operate the camera equipment unless it also performed the program's lighting tasks.

For purposes of this enforcement proceeding, respondent concedes its violation of §8(b)(4)(D). But it contends that the Board failed to comply with the special procedure prescribed by §10(k), 29 U. S. C. §160(k).[2] This section provides that when an unfair

[1] Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, AFL-CIO.

[2] Sec. 10(k) provides:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

labor practice is charged under §8(b)(4)(D), "the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen," with an exception not here involved encouraging voluntary adjustment of the dispute. The Board concedes that a determination under this section is a prerequisite to the issuance of a cease and desist order, but contends that its hearing and finding fulfilled the requirement.

Thus the only question involves the construction of the statutory direction to "determine the dispute." The Board's position is that its finding that the respondent had no claim by contract, order, or certification to the disputed work suffices, while respondent maintains that the Board is required affirmatively to allocate the work to one of the competing unions. This issue has been resolved against the Board by the Third and Seventh Circuits. See *N. L. R. B.* v. *United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of U. S. and Canada, Locals 420 and 428, AFL (Hake)*, 3 Cir., 242 F. 2d 722; *N. L. R. B.* v. *United Brotherhood of Carpenters and Joiners of America, AFL (Wendnagel)*, 7 Cir., 261 F. 2d 166. But the Board has adhered to its position, although it has not sought certiorari to resolve the dispute.

We turn first to an examination of the statutory language. The scheme of §10(k) is to provide an opportunity for the private adjustment of disputes causing jurisdictional strikes; but in the absence of such adjustment, the Board itself is to determine the disputes. It is difficult to attribute any meaning to the word "dispute" unless it refers to the controversy between the unions as to which is entitled to the work. It also seems clear that the Board's function is to impose a settlement in the event that the parties are

unable themselves to reach agreement. Since private adjustment can only envision agreement as to which group is entitled to the work, the Board is required to make this determination where private negotiation proves unsuccessful. Further, under the Board's view that Congress has left the determination of disputes involving work assignments to the employer, the §10(k) hearing and determination become superfluous. Private settlement would be equally encouraged by a provision for a 10-day notice in advance of an unfair labor practice proceeding.

Although the language of the enactment is unambiguous, the legislative history is not thereby rendered immaterial. But since Judge Hastie in the *Hake* case, *supra*, 3 Cir., 242 F. 2d 722, has fully reviewed this history, we shall content ourselves with a brief summarization. The original provision, as adopted by the Senate, would have settled jurisdictional disputes by compulsory arbitration before a Board-appointed arbitrator or in the alternative through adjudication by the Board itself. S. 1126, 80th Cong., 1st Sess. (1947). But the arbitration clause was deleted in conference committee, so that the bill as enacted prescribed Board determination alone. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 57 (1947). The discussion of these provisions on the floor and in committee reports leaves no doubt that the Congress contemplated affirmative Board adjudication of disputed work allotments. See *Hake*, *supra*, 3 Cir., 242 F. 2d 722, 725; 71 Harv. L. Rev. 1364, 1366 (1958).

The Board urges that its policy has encouraged the voluntary settlement of jurisdictional disputes and thus has refuted the fears of those who opposed passage of §10(k) on the ground that it would encourage rather than prevent strikes. Such apprehension

not only was expressed in the Congress, but also constituted one of the grounds for the Presidential veto. See 93 Cong. Rec. 6452-6453, 6506, 7486. But this line of argument in effect admits that the Board's construction of the Congressional mandate does not conform to the understanding expressed by opponents, as well as proponents, of the section. Since the provision has not been effectuated as enacted, whether or not jurisdictional strikes will be encouraged remains as speculative today as it was in 1947. Since Congress chose to disregard this risk, it is not for the courts or the Board to accord it greater weight. It might also be noted in passing that during the pendency of the present case, another telecast was cancelled because of picketing by the IATSE when the disputed lighting work was assigned to respondent. Thus the prospect of voluntary settlement seems somewhat remote.

The Board also relies on arguments based on the internal consistency of the Act's provisions. Thus it cites §303(a)(4), which contains language substantially identical to that of §8(b)(4)(D), but which by virtue of §303(b) grants an independent action for damages to those injured by jurisdictional disputes. The Board asserts that an incongruous result is reached if damages may be assessed under §303(a)(4), although the union may be found entitled to the work by virtue of an affirmative allocation under §10(k). In this respect reliance is placed on *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 9 Cir., 189 F. 2d 177, affirmed 342 U. S. 237. While there is language in the opinion of the Ninth Circuit which supports the Board's position,[3] the Supreme Court's decision rests on the

[3] "[U]nder the plain language of Section 8(b)(4)(D) we are unable to see how the Board in a Section 10(k) proceed-

premise that the two sections are not to be construed *in pari materia*. It is to be expected that the considerations which underlie the grant of private redress differ from those which determine the application of administrative process.

A conflict is also alleged to exist between an affirmative award of work jurisdiction and the provisions of §§8(a)(3) and 8(b)(2) which protect employees from discrimination because of their union membership or lack thereof. The Board notes its agreement with the suggestion by Judge Hastie in the *Hake* case, *supra*, 3 Cir., 242 F. 2d 722, that a §10(k) determination would not be binding on the employer; but it asserts that the determination "would presumptively authorize that union 'to cause or attempt to cause' the employer to discriminate against the incumbent employees to whom he has assigned the work." But in view of the nature of the disputed tasks here involved it is improbable that any employees will be displaced. Even assuming such displacement, Congress has apparently adjudged that this interest is outweighed by the policy of settling jurisdictional disputes. Further, the same result would seem to be effected by the Board's determination of disputes involving the scope of bargaining units. See *Local 26 (Winslow Bros. & Smith Co.)*, 90 N. L. R. B. 1379; *Amalgamated Meat Cutters & Butcher Workmen (Safeway Stores, Inc.)*, 101 N. L. R. B. 181; *National Association of Broadcast Engineers & Technicians (American Broadcasting-Paramount Pictures)*, 110 N. L. R. B. 1233.

The Board's suggestion that the result here reached would "erect an almost insuperable obstacle" to the

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ing could make a determination adverse to the assignment of the work by [the employer]." 9 Cir., 189 F. 2d 177, 188.

issuance of injunctive relief under §10(1) is adequately answered by *Alpert* v. *International Brotherhood of Electrical Workers, Local No. 90, AFL-CIO*, D. C. Conn., 163 F. Supp. 774. Reliance is also placed on the lack of statutory standards on which to base an affirmative determination. But the relevant criteria have been suggested by Board Member Murdock, dissenting in *Local 562 (Northwest Heating Company)*, 107 N. L. R. B. 542, 554.

It may be that the Board's assertions would be more persuasive if the intent of Congress were unclear. Note, however, Professor Cox's testimony that the Board's practice "is unsound whether it is required by the statute or results from misapplication." Hearings on Proposed Revisions of the Labor-Management Relations Act of 1947, Senate Committee on Labor & Public Welfare, 83d Cong., 1st Sess., pt. 4, pages 2428-2431 (1953). It is also instructive that there seems to have been no compliance with the Board's own rules, which recognize its power to allocate disputed tasks. This was the ground on which enforcement was refused by the Seventh Circuit in the *Wendnagel* case, *supra*, 7 Cir., 261 F. 2d 166. Our attention has been directed to the fact that these rules have been "rephrased" subsequent to the hearing herein; but, as the Board itself notes, its rules are immaterial unless they comply with the statutory scheme.

In view of the unambiguous language of §10(k), and supported as it is by the legislative history and the precedents, we are convinced that the Board's present position contravenes the statutory direction.

Accordingly, the petition for enforcement is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 25573

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL 1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, RESPONDENT

DECREE

Before CLARK, MOORE, *Circuit Judges*, & SMITH, *District Judge*.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondent on October 9, 1958. The Court heard argument of respective counsel on October 16, 1959, and has considered the briefs and transcript of record filed in this cause. On December 3, 1959, the Court being fully advised in the premises, handed down its decision denying Board's petition for enforcement of its order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board directed against Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Elec-

trical Workers, AFL-CIO, its officers, representatives, agents, successors and assigns, be and it hereby is denied.

CHARLES E. CLARK
Judge, United States Court of Appeals for the Second Circuit

LEONARD P. MOORE
Judge, United States Court of Appeals for the Second Circuit

A true copy,

/s/ A. Daniel Fusaro
Clerk

Filed: December 28, 1959

APPENDIX C

J-2634

Loc. 450, Int'l Union of Operating Engineers
(Sline Industrial Painters)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17789

NATIONAL LABOR RELATIONS BOARD, PETITIONER
(Sline Industrial Painters—Employer)

v.

LOCAL 450, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.*

(February 18, 1960)

Before TUTTLE, CAMERON and WISDOM, *Circuit Judges.*

TUTTLE, *Circuit Judge*: This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against respondent on March 3, 1959. The Board's

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* 39-CD-25; 119 NLRB 1725

Decision and Order in the unfair labor practice proceeding are reported at 123 N.L.R.B. 2. The Board's earlier Decision and Determination of Dispute relating to the instant matter is reported at 119 N.L.R.B. 1725. This Court has jurisdiction of the proceedings under Section 10(e) of the Act, the unfair labor practices having occurred at Texas City, Texas, where Sline Industrial Painters, herein called Sline (the employer here involved), was engaged in construction work affecting interstate commerce.

The Board found that respondent violated Section 8(b)(4)(D) of the Act [1] by inducing and encouraging employees to cease work for the purpose of requiring Sline to assign the work of operating an air compressor to a member of respondent rather than to other Sline employees. The Board's finding was based on the following statement of facts, which respondent says "is substantially correct."

In April 1957, Sline was engaged in construction and maintenance painting at the Monsanto plant in Texas City, Texas. In connection with its work Sline used an air compressor which was virtually automatic, but required manual starting and stopping by

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[1] 79 U.S.C.A. 158(b)(4)(D) provides as follows:

"It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike . . . where an object thereof is: . . . forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . ."

turning a key, work involving only about a minute each day. Sline followed the general practice of having employees nearest the compressor start and stop it. On April 2 respondent's steward, Bud Miller,[2] had asked Leslie May (Sline's superintendent) if he was going to hire an operating engineer for the compressor, and May replied that he was not. Miller called this to the attention of Searcy, respondent's business representative, who thereafter attempted to get Sline to hire an engineer, and told the operating engineers employed by Tampco to delay reporting for work the morning of April 3. Searcy then spoke to Donovan, Monsanto's superintendent, and asked him to help persuade Sline to hire an engineer. Believing that Donovan would get the matter straightened out, Searcy instructed Tampco's operating engineers to report for work, Meanwhile, also on April 3, May instructed Combre, a member of Painters' Local 585, who happened to be nearby, to start the compressor, and May made Combre responsible for starting the compressor thereafter.

Later in the morning of April 3 Donovan told Searcy he was not able to help him. Shortly thereafter, Piangenti, timekeeper for Tampco, received two calls at Tampco's field office for Miller. Miller was not then available, and a message was left to have him call Searcy at respondent's local hiring hall. Accordingly, when Miller came to Tampco's office shortly before noon, he called Searcy. After completing the call, Miller told Piangenti that Searcy had told him of the lack of success and that "we are going in at noon." At Piangenti's request, Miller

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[2] Miller was employed by Tampco Piping, Inc., herein called Tampco, another contractor working at the Monsanto plant.

agreed to have the operating engineers shut down their equipment in the field and bring in their trucks before punching out. Miller added that it was the "same old story, same old thing." At about 12:30 P.M., the four operating engineers employed by Tampco checked out, and they did not return to work that afternoon.

The next day Tampco notified the National Joint Board for Settlement of Jurisdictional Disputes that the respondent had called a strike against Tampco because of a dispute with Sline over assignment of an operator for the air compressor. On April 9, Chairman Dunlop of the Joint Board directed the International Union of Operating Engineers to instruct respondent to have the employees return to work and either adjust the dispute directly with the Painters or process any complaint in accordance with Joint Board procedures. Dunlop, in the erroneous belief that Tampco was a subcontractor of Sline, requested both Sline and Tampco to send a complete description of the disputed work to the Joint Board. In a later letter Dunlop directed Sline to proceed with the work as originally assigned pending the Joint Board's decision. On May 2, Sline sent the requested description to the Joint Board. On May 6, the Joint Board, having learned for the first time that Tampco was not involved in the dispute, informed the interested parties that, because of the previous misunderstanding, the Operating Engineers, the Electricians, and the affected contractors were being asked whether they wished to present any further statements to the Joint Board before it rendered its decision. Sline did not respond to this letter. On May 10, the Joint Board awarded the disputed work to respondent. Sline then protested that the Joint Board should not have assumed jurisdiction because Sline had not sub-

mitted the dispute to it. Chairman Dunlop replied that the Joint Board decided the dispute "on its own motion," pointing out that no party had objected to the Joint Board's contemplated action when it requested the parties to state their positions.

The unfair labor practice charges filed in April 1957 alleged that respondent had violated Section 8(b)(4)(D), the "jurisdictional disputes" section of the statute. Pursuant to the statutory scheme for the handling of jurisdictional disputes, the Board in July 1957 held the hearing prescribed by Section 10(k) (29 U.S.C.A. §160(k)) to "hear and determine the dispute out of which the charge of a Section 8(b)(4)(D) violation arose.[3]

The Board found, on the basis of the facts set forth, that Sline's assignment of the disputed work to a member of the Painters, was not in contravention of an order or certification of the Board, and that respondent had no contract with Sline that bound Sline to assign the disputed work to its members. The Board also found that the evidence was insufficient to estabilsh that Sline had submitted or acquiesced in the submission of the dispute to the Joint Board or that Sline was bound by the Joint Board's determination. Under these circumstances, the Board found

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[3] The relevant provisions of Section 10(k) are:

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they had adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. . . ." 29 U.S.C.A. §160(k).

that respondent was not lawfully entitled to force or require Sline to assign the operation of the air compressor to its members rather than to other Sline employees.

Accordingy, the Board directed respondent to notify the Regional Director within 10 days whether it would comply with the Board's determination.

The respondent having refused to comply with the Board's direction, the General Counsel of the Board, on June 3, 1958, issued a complaint alleging a violation of Section 8(b)(4)(D) of the Act. Included in the evidence adduced at the ensuing unfair labor practice hearing were the official records of the prior Section 10(k) proceeding.

Upon the evidence thus adduced, the Board concluded, affirming the Trial Examiner, that respondent violated Section 8(b)(4)(D) by striking, and inducing employees of Tampco to engage in a strike, with an object of forcing or requiring Sline to assign certain work to members of respondent rather than to other Sline employees.

The Board's order requires respondent to cease and desist from engaging in, or inducing or encouraging the employees of Tampco or any other employer, to engage in a strike, or other proscribed conduct, where an object thereof is to force or require Sline to assign particular work to members of the respondent union rather than to other employees except insofar as such action is permitted under Section 8(b)(4)(D). Affirmatively, the order directs respondent to post appropriate notices and to notify the Board's Regional Director what steps have been taken to comply with the order.

Although there are several subsidiary questions raised by respondents, their principal contention is that when such a complaint is filed, charging an un-

fair labor practice under the jurisdictional strike provisions of the Act, the Board is under the duty under Section 10(k) to consider the claims of the striking union to the work in question (here the right to turn on and off the compressor motor), consider the contention of the other party, here the employer Sline, and decide whether the striking union should be awarded the work or the employer be left free to assign it as he sees fit. This, respondent says, is required by the language of the section that says "the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen." The Board, to the contrary, says that it is not required to resolve this dispute, that is, in effect engage in compulsory arbitration as between the parties, but may, as it did here, determine only whether the employer was under contract with respondent requiring him to assign the work to it or whether Sline's assignment of the work to its painter employee was in contravention of an order or certification by the Board.

We agree with the position of the Board, and hold that the failure of the Board to make a decision assigning the task of turning the compressor engine on and off either to the painter employee or to respondent does not invalidate its subsequent proceeding resulting in the complained-of injunction. We arrive at this conclusion with the greatest deference to the views of the Courts of Appeals for the Third, Seventh and Second Circuits, with whose judgments to the contrary we cannot agree. See *N.L.R.B.* v. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Locals 420 and 428* (3 Cir.), 242 F. 2d 722; *N.L.R.B.* v. *United Brotherhood of Carpenters and Joiners of America*, (7 Cir.) 261 F. 2d 166; and *N.L.R.B.* v. *Radio &*

Television Broadcast Engineers Union Local 1212, (2 Cir.) .... F. 2d .....

In construing the language of Section 10(k) the first comment we think must be made as to respondent's contention that it is to be construed as setting up a rule of substantive law requiring compulsory arbitration by the Board as between an employer who has exercised his clearly guaranteed right of assigning work to any employee he chooses and a union which simply demands the job for one of its members is that the language is strange language, indeed, to import into the procedural section of the Labor Act such a revolutionary concept. This would mean that whenever an employer is using one of his employees, either skilled or unskilled, to perform a job (even though it be one requiring only *one minute* a day as was true here) and a labor organization wishes to compel him to hire one of its members to perform the job it can, notwithstanding the clear substantive declaration of Section 8(b)(4)(D) that it is an unfair labor practice for such union to "strike . . . when an object thereof is . . . forcing or requiring any employer to assign any particular work to" its employees, go out on strike, force a Section 10(k) hearing and require the Board to settle "the dispute," i.e., decide whether it or the employer should be entitled to assign an employee to the job.

Such a construction being utterly inconsistent with the entire purpose of the substantive provisions of the law, we think that the language should not be so construed unless no other reasonable construction can be made. The Board has construed this provision to mean that where there has been an assignment of the work in question by an employer, the Board's "determination of the dispute" is complete when it ascertains whether such an assignment by the employer

is in violation of a contract by which the employer is bound or is in contravention of an order or certification of the Board. In view of the language of Section 8(b)(4)(D), which prevents such a strike from being an unfair labor practice if "such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work," and in view of the fact that a breach of a contract to permit the striking union to assign an employee to the job might arguably prevent the strike from being an unfair labor practice, it seems clear that the ascertainment whether the employer was in violation of a contract, or in contravention of an order or certification of the Board is comprehended in the terms "determine the dispute." We therefore think that the finding made here by the Board to the effect that Sline's assignment of the work to the painters was not in contravention of an order or certification of the Board, and that respondent had no contract with Sline that bound Sline to assign the work to its members was a determination of "the dispute out of which such unfair labor practice [arose]."

In the first of the cases construing Section 10(k) as requiring compulsory arbitration, the court recognized that such construction may make the section "seem anomalous" when considered in the light of the clear prohibition of Section 8(a)(3) of the Act. See *N.L.R.B.* v. *United Association of Journeymen*, 242 F. 2d 722, 727, where the court said:

> "Moreover, we do not believe that the plain requirement of Section 10(k) should be disregarded *even though another provision of the statute may make it seem anomalous.*" (Emphasis added)

With deference, we do not consider the plain meaning of Section 10(k) to be as there held by the court; thus we think the fact that the construction given to it brings it in conflict with other provisions of the statute is strongly persuasive of the need for finding a different meaning for the words. We think this is even clearer because Section 8(b)(4)(D) and Section 8(a)(3) are substantive sections clearly outlining what shall be considered to be unfair labor practices, whereas everything in Section 10 is procedural in nature. It would be extremely strange if what the act proscribed in Section 8 as an unfair labor practice should be made to lose its illegal character by proceedings designed in Section 10 to provide means for calling sanctions into play.

We note that the Supreme Court in *International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, at 243 says:

> "Section 8(b)(4)(D) and Section 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; Section 303(a)(4) to a judgment for damages."

Yet the Supreme Court expressly in that case ruled that a suit for damages for the very kind of strike as was charged here can be maintained without any Section 10(k) hearing. This is strongly persuasive, we think, that the requirements of 10(k) are purely procedural, for it seems highly unlikely that Congress would enact a statute permitting an aggrieved person to sue for damages for a jurisdictional strike, with the quality of the strike finally and irrevocably fixed without any Board determination, and at the same time provide that the same strike would no longer be an unfair labor practice as a basis for seek-

ing injunction if the Board, acting as arbitrator assigned the work to the striking union. Under such a construction the work would have been assigned by the Board to the striking union and no violation of 8(b)(4)(D) would exist, but the employer would still have his right to sue for damages because the strike would still be a violation of 303(a)(4). We conclude that Congress did not intend such an anomaly. We agree with the Court of Appeals for the Ninth Circuit which said:

> "Under the plain language of Section 8(b)(4)(D) we are unable to see how the Board in a Section 10(k) proceeding could make a determination adverse to the assignment of the work by [the employer]." *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 9 Cir., 189 F. 2d 177, 178.

We conclude that where, as here, an employer has assigned work to an employee and a labor organization does any of the acts proscribed by Section 8(b)(4)(D), the Board is not required, as a part of its determination of the dispute, to make an adjudication as between the employer and the labor organization assigning the work to one or the other as a prerequisite to the granting of 10(c) relief by the Board. This is consistent with the Board's unvarying construction of the statute and is the only construction which in our opinion does not undercut the clearly expressed purpose of the statute to outlaw and eliminate jurisdictional strikes. United Brotherhood of Carpenters, 98 NLRB 346, 349-50; Los Angeles Building Trades Council, 83 NLRB 477; International Longshoremen's Union, 82 NLRB 650, 659-60.

As to the subsidiary questions, we are fully satisfied that the evidence supported the findings of the

Board that the proscribed acts did occur and that there was no consent by Sline to submit the jurisdictional dispute to the Joint Board with authority to settle it.

Moreover, the Board did not err in failing to permit the introduction of additional evidence at the Section 8(b)(4)(D) hearing on the fact issues decided at the 10(k) proceeding. For a further discussion of this point see the companion case decided contemporaneously herewith, No. 17,840.

Petition for enforcement is granted.

ORDER ENFORCED.

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